UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1312 -- August Term, 1993

(Argued: March 2, 1994 Decided: December 5, 1994)

Docket No. 93-7687

CCC INFORMATION SERVICES, INC.,

Plaintiff-Appellee,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,

Defendant-Appellant,

CREATIVE AUTOMATION CO.,

Defendant.

Before:

KEARSE, PIERCE, AND LEVAL,
Circuit Judges.

Appeal from a judgment of the District Court for the District of Connecticut, Alan H. Nevas, *Judge*, adopting the report and Recommendation of Magistrate Judge Arthur H. Latimer. The district court granted summary judgment to plaintiff, declaring that plaintiff had not infringed defendant's copyright.

Reversed and remanded with instructions to enter judgment ln favor of defendant on its counterclaims alleging copyright infringement.

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LEVAL, *Circuit Judge*:

The appellant, publisher of a compendium of its projections of used car valuations, seeks to establish copyright infringement on the part of a competitor, which copied substantial portions of appellant's compendium into the computer data base of used car valuations it offers to its customers. Arising in the wake of the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991), this appeal raises the question of the scope of protection afforded by the copyright law to such compilations of informational matter. Finding no infringement, the district court granted summary judgment to the appellee. In our view, the copyright law offers more substantial protection to such compilations than envisioned in the district court's ruling. We therefore reverse.

Background

The Red Book. The appellant is Maclean Hunter Market Reports, Inc. ("Maclean"). Since 1911, Maclean, or its predecessors, have published the *Automobile Red Book -- Official Used Car Valuations* (the "Red Book").[1] The Red Book, which is published eight times a year, in different versions for each of three regions of the United States (as well as a version for the State of Wisconsin), sets forth the editors' projections of the values for the next six weeks of "average" versions of most of the used cars (up to seven

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[1] For the entire period at issue in this case, each edition of the Red Book has included a copyright notice, and has been registered with the U.S. Copyright Office.

years old) sold in that region.[2] These predicted values are set forth separately for each automobile make, model number, body style, and engine type. Red Book also provides predicted value adjustments for various options and for mileage in 5,000 mile increments.

The valuation figures given in the Red Book are not historical market prices, quotations, or averages; nor are they derived by mathematical formulas from available statistics. They represent, rather, the Maclean editors' predictions, based on a wide variety of informational sources and their professional judgment, of expected values for "average" vehicles for the upcoming six weeks in a broad region. The introductory text asserts, "You, the subscriber, must be the final judge of the actual value of a particular vehicle. Any guide book is a supplement to and not a substitute for expertise in the complex field of used vehicle valuation."

CCC's computer services. Appellee CCC Information Services, Inc. ("CCC"), is also in the business of providing its customers with information as to the valuation of used vehicles. Rather than publishing a book, however, CCC provides information to its customers through a computer data base. Since at least 1988, CCC has itself been systematically loading major portions of the Red Book onto

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[2] Maclean also publishes the Older Car/Truck Red Book, which offers similar projected valuations for vehicles eight to eighteen years old.

its computer network and republishing Red Book information in various forms to its customers.[3]

CCC utilizes and resells the Red Book valuations in several different forms. CCC's "VINguard Valuation Service" ("VVS") provides subscribers with the average of a vehicle's Red Book valuation and its valuation in the NADA Official Used Car Guide (the "Bluebook"), the other leading valuation book, published by the National Automobile Dealers Association ("NADA"). The offer of this average of Red Book and Bluebook satisfies a market because the laws of certain states use that average figure as a minimum for insurance payments upon the "total loss" of a vehicle. CCC's "Computerized Valuation Service" ("CVS"), while it primarily provides its subscribers with CCC's independent valuation of used cars, also provides customers with the Red Book/Bluebook average and the Red Book values standing alone.

It is uncontested that CCC earns significant revenues through the sale of its services, in which it both directly and indirectly resells the figures it copies every few weeks from the Red Book. As the court found below, since 1988 numerous Red Book customers have canceled their subscriptions, opting instead to purchase CCC's services. Op. at 25 (JA 665).

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[3] In 1981, CCC unsuccessfully attempted to secure a license from Maclean to use Red Book valuations on its on-line services. In 1984, CCC wrote to the publisher of the Red Book to inform it that it was being "ripped off" because another computer averaging service was using Red Book's figures.

Proceedings below. CCC brought this action in 1991, seeking, inter alia, a declaratory judgment that it incurred no liability to Maclean under the copyright laws by taking and republishing material from the Red Book. Maclean counterclaimed alleging infringement. CCC then pleaded various affirmative defenses, including that it used the Red Book for its intended purpose, fair use, and that the Red Book has come into the public domain as the result of its adoption in state statutes regulating the amount of insurance payments. CCC also made various contentions based on waiver, estoppel, consent, and untimeliness.

Both sides moved for summary judgment, and the motions were referred for report and recommendation to Magistrate Judge Arthur H. Latimer. Magistrate Judge Latimer recommended to the district court that CCC's motion for summary judgment be granted. Judge Latimer found (1) that the Red Book employed no originality or creativity in the selection, coordination or arrangement of data, and therefore did not constitute a protected "original work of authorship," 17 U.S.C.A. § 101 (West 1977); (2) that the Red Book valuations were facts, or interpretations of facts, and were, therefore, not protected by copyright; (3) that, even if the entries were not facts, copyright protection was nonetheless precluded by the doctrine of "merger of idea and expression," because each entry in the Red Book is an idea -- the idea of the value of the particular vehicle -- and that idea is necessarily communicated by a dollar figure; and (4) that the Red Book had been placed in the public domain by being "incorporated into governmental regulations." District Judge Nevas then "approved, adopted and ratified"

the Magistrate Judge's recommended ruling, and judgment was entered in CCC's favor. Endorsement at JA 671.

Discussion

1. *Does the Red Book manifest originality so as to be protected by the copyright laws?* The first significant question raised by this appeal is whether Maclean holds a protected copyright interest in the Red Book. CCC contends, and the district court held, that the Red Book is nothing more than a compilation of unprotected facts, selected and organized without originality or creativity, and therefore unprotected under the Supreme Court's teachings in *Feist*. We disagree.

The Copyright Act of 1976 explicitly confers limited protection on compilations. Section 103(a) specifies that "[t]he subject matter of copyright . . . includes compilations," which are defined by Section 101 as assemblies of data "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship"; Section 103(b) makes clear that the protection in a compilation "extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material." 17 U.S.C.A. §§ 101 - 103 (West 1977).

In *Feist*, the Supreme Court ruled that originality is an essential element of copyright protection, and that toil, or "sweat of the brow," expended in collecting information does not justify conferring copyright protection on a compilation of facts; rather, protection attaches only if the selection,

coordination, or arrangement exhibit originality, so that "the resulting work as a whole constitutes an original work of authorship." 17 U.S.C.A. § 101 (West 1977). Concluding that a white pages telephone directory, consisting of an alphabetical listing of the names, towns of residence, and telephone numbers of all the subscribers in the area of the telephone company's franchise (as required by state law), "lack[ed] the requisite originality," 499 U.S. at 364, the Court held that the white pages were not within the protection of the copyright, and could therefore freely be copied by the publisher of another telephone directory without infringement.

Notwithstanding its conclusion with respect to such a telephone directory, the Court emphasized that:

> [o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

Id. at 345 (citations omitted). The Court repeatedly stressed that the required level of originality is minimal, and that most compilations, merely by exercising some independent choice in the coordination, selection, or arrangement of data,

will pass the test.[4] The telephone directory failed because it was found to be *completely* devoid of originality.

The protection of compilations is consistent with the objectives of the copyright law, which are, as dictated by the Constitution, to promote the advancement of knowledge and learning by giving authors economic incentives (in the form of exclusive rights to their creations) to labor on creative, knowledge-enriching works. U.S. Const. art. 1, § 8, cl. 8 ("Congress shall have the Power . . . To promote the

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[4] The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

Feist, 499 U.S. at 348 (citations omitted).

> [T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.

Id. at 358-59.

Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings"). Compilations that devise new and useful selections and arrangements of information unquestionably contribute to public knowledge by providing cheaper, easier, and better organized access to information. Without financial incentives, creators of such useful compilations might direct their energies elsewhere, depriving the public of their creations and impeding the advance of learning.

The grant of such monopoly protection to the original elements of a compilation, furthermore, imposes little cost or disadvantage to society. The facts set forth in the compilation are not protected and may be freely copied; the protection extends only to those aspects of the compilation that embody the original creation of the compiler. For these reasons, the copyright law undertakes to guarantee the exclusive rights of compilers, like other authors, to whatever is original and creative in their works, even where those original contributions are quite minimal.

The thrust of the Supreme Court's ruling in *Feist* was not to erect a high barrier of originality requirement. It was rather to specify, rejecting the strain of lower court rulings that sought to base protection on the "sweat of the brow," that *some* originality is essential to protection of authorship, and that the protection afforded extends only to those original elements. Because the protection is so limited, there is no reason under the policies of the copyright law to demand a high degree of originality. To the contrary, such a requirement would be counterproductive. The policy embodied into law is to encourage authors to publish

innovations for the common good -- not to threaten them with loss of their livelihood if their works of authorship are found insufficiently imaginative.

In recognition of these considerations, we have several times since *Feist* upheld copyright claims for compilations and similar works where the originality component was extremely modest. In *Kregos v. Associated Press*, 937 F.2d 700, 706-07 (2d Cir. 1991), for example, we reversed a ruling of the district court that the selection of nine statistical categories for use on a baseball pitching form failed to demonstrate the necessary originality. In *Key Publications. Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 514 (2d Cir. 1991), we held, inter alia, that the selection, from a more general list, of businesses of special interest to Chinese-Americans also merited copyright protection. Several years before *Feist*, in *Eckes v. Card Prices Update*, 736 F.2d 859, 863 (2d Cir. 1984), we held that an author's subjective decision as to which baseball cards are "premium" is entitled to protection.[5]

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[5] By contrast, we found no infringement in *Victor Lalli Enters. Inc. v. Big Red Apples Inc.*, 936 F.2d 671 (2d Cir. 1991), because the charts at issue were "'purely functional grids that offer[ed] no opportunity for variation,'" and the author exercised "neither selectivity in what he reports nor creativity in how he reports it." *Id.* at 673 (quoting district court in part).

For other examples of cases upholding data selection as meeting copyright's originality requirement, *see* 1 William F. Patry, *Copyright Law and Practice* (1994). They include:

> the choice of categories of Medicaid data to include in charts; the 'judgement and knowledge of the author respecting the social

In our view, the district court misapplied these precedents. It interpreted *Feist* and our subsequent holdings as erecting a high barrier of originality as a prerequisite to copyright protection, rather than, as *Feist* so emphatically stated, a minimal requirement.

The district court gave several reasons for its ruling that the Red Book failed the test for originality. First, the court stated, "Maclean Hunter has not persuasively demonstrated that the values published in the Red Book are anything more than interpretations or analyses of factual information . . . While Maclean Hunter may have been the first to discover and report this material, the material does not 'owe its origin' to Maclean Hunter." (Citing *Feist*, 499 U.S. at 361; Op. at 16-17 (JA 656-57).)

The district court was simply mistaken in its conclusion that the Red Book valuations were, like the telephone numbers in *Feist*, pre-existing facts that had merely been discovered by the Red Book editors. To the contrary, Maclean's evidence demonstrated without rebuttal that its

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standing and societal relations of a limited class of the general public;' a daily time organizer; the choice of 'true' public relations firms to include in a directory; a list of state tariffs on pay telephones; selection of the most important and helpful cross-streets and assignment of address numbers for the streets; information about cable television systems throughout the United States . . . . The key factor is the exercise of some editorial judgment in the selection of data.

Id. at 199-200.

valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather, they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions.[6] According to Maclean's evidence, these predictions were based not only on a multitude of data sources, but also on professional judgment and expertise. The testimony of one of Maclean's deposition witnesses indicated that fifteen considerations are weighed; among the considerations, for example, is a prediction as to how traditional competitor vehicles, as defined by Maclean, will fare against one another in the marketplace in the coming period. (JA 209-12.) The valuations themselves are original creations of Maclean.

Recognizing that "[o]riginality may also be found in the selection and ordering of particular facts or elements," the district court concluded that none had been shown. Op. at 17 (JA 657). This was because the Red Book's selection and arrangement of data represents "a logical response to the needs of the vehicle valuation market." *Id.* at 18 (JA 658). In reaching this conclusion, the district court applied the wrong standard. The fact that an arrangement of data responds *logically* to the needs of the market for which the compilation was prepared does not negate originality. To

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[6] That they are expressed in numerical form is immaterial to originality. Original authorship warranting protection may be "fixed in any tangible medium of expression . . . includ[ing] . . . literary works." 17 U.S.C.A. 102(a) (West 1977). The Act broadly defines literary works to include "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols . . . ." 17 U.S.C.A. § 101 (West 1977).

the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent creation. *See Feist*, 499 U.S. at 359 (originality is to be found unless the creative spark is so utterly lacking as to be "virtually nonexistent").

We find that the selection and arrangement of data in the Red Book displayed amply sufficient originality to pass the low threshold requirement to earn copyright protection. This originality was expressed, for example, in Maclean's division of the national used car market into several regions, with independent predicted valuations for each region depending on conditions there found. A car model does not command the same value throughout a large geographic sector of the United States; used car values are responsive to local conditions and vary from place to place. A 1989 Dodge Caravan will not command the same price in San Diego as in Seattle. In furnishing a single number to cover vast regions that undoubtedly contain innumerable variations, the Red Book expresses a loose judgment that values are likely to group together with greater consistency within a defined region than without. The number produced is necessarily both approximate and original. Several other aspects of the Red Book listings also embody sufficient originality to pass *Feist*'s low threshold. These include: (1) the selection and manner of presentation of optional features for inclusion;[7] (2) the adjustment for mileage by 5,000 mile

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[7] This selection includes far fewer than all extant options, and presents them in a manner that furnishes a single valuation to cover the particular option in numerous different vehicles. The editors make these choices to accommodate the practical space limitations imposed by the

increments (as opposed to using some other breakpoint and interval); (3) the use of the abstract concept of the "average" vehicle in each category as the subject of the valuation; and (4) the selection of the number of years' models to be included in the compilation.

We conclude for these reasons that the district court erred in ruling that the Red Book commands no copyright protection by reason of lack of originality.[8]

2. *The idea-expression dichotomy and the merger of necessary expression with the ideas expressed.* CCC's strongest argument is that it took nothing more than ideas for which the copyright law affords no protection to the author. According to this argument, (1) each entry in the Red Book expresses the authors' *idea* of the value of a particular vehicle; (2) to the extent that "expression" is to be found in the Red Book's valuations, such expression is indispensable to the statement of the idea and therefore merges with the idea, so that the expression is also not protectible; and (3) because each of Red Book's valuations could freely be taken

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book's format, while providing the information most likely to satisfy customers' needs.

[8] The district court also believed that CCC did not infringe Red Book's original protected elements because CCC included Red Book's selection in a more extensive data base. We disagree. Original aspects of Red Book's ordination and arrangement were inextricably present whenever CCC copied and republished any Red Book valuation, because each valuation incorporated the Red Book editors' original judgment concerning the predicted value of that automobile, as well as their judgment as to geographic consistency within a region.

without infringement, all of them may be taken without infringement. This was one of the alternate bases of the district court's ruling in CCC's favor.

The argument is not easily rebutted, for it does build on classically accepted copyright doctrine. It has been long accepted that copyright protection does not extend to ideas; it protects only the means of expression employed by the author. As the Supreme Court stated in *Mazer v. Stein*, 347 U.S. 201 (1954),

> Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself. Thus, in *Baker v. Selden*, 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings.

Id. at 217 (footnote omitted).

It is also well established that, in order to protect the immunity of ideas from private ownership, when the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea. *See Kregos*, 937 F.2d at 705; *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("When the 'idea' and its 'expression' are inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such

circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law.").[9]

We nonetheless believe the district court erred in granting judgment to CCC. We reach this conclusion based on the need to balance the conflicts and contradictions that pervade the law of copyright, and the need, where elements of the copyright law conflict, to determine, as a policy judgment, which of its commands prevails over the other.

The fundamental principle of copyright, as expressed in the Copyright Clause of the Constitution, is to promote the advance of knowledge by granting authors exclusive rights to their writings.[10] As the Supreme Court said in *Mazer*, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" 347 U.S. at 219. *See also Nimmer* at § 1.03[A]. The financial incentives to authors consist of exclusive rights to their

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[9] For more extensive discussions of the merger doctrine, *see* William F. Patry, *Copyright Law and Practice*, 312-325 (1994); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.03[A]-[B] (1994).

[10] This essential formulation is found in England's Statute of Anne of 1710, which conceived the Anglo-American copyright. It is entitled, "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies." The statute is reprinted in Patry, *supra*, at 1461-64.

writings, that may be sold or licensed for money, so that authors may earn a living from the creations that benefitted the public.

From an early time, however, courts, taking a different approach from that taken in the patent law, developed a theory which almost directly contradicted the original theory of copyright. The new theory was that ideas are too important to the advancement of knowledge to permit them to be under private ownership, and that open public debate, which is essential to a free democratic society, requires free access to the ideas to be debated.[11] *See* Patry, *supra*, at 122-23, 319, *Nimmer* at §1.10[B] 1-71 to -74, 78-79, § 13.03[B] at 13-69 to -70. Judicially created doctrine thus led to a drastic limitation on the scope of copyright protection.[12] Ideas were not to be protected; only the

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[11] As Nimmer explains:

> The policy rationale underlying the Act's exclusion of ideas from copyright protection is clear. To grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This effect, it is reasoned, would hinder rather than promote the professed purpose of the copyright laws, i.e., "the progress of science and useful arts."

Nimmer § 13.03[B] at 13-69 to -70 (footnotes omitted).

[12] This doctrine is codified in section 102(b) of the Copyright Act, which provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless

manner of their "expression." This limitation came to be known as the "idea-expression" dichotomy.

The contradiction between these imperatives, one calling for the protection of creations that will advance the progress of knowledge, the second requiring that these same creations be free of protection, has understandably given rise to bewildering problems of interpretation as to whether copying has been of protected expression or of the unprotected ideas underlying the expression.[13] These difficulties led Judge Learned Hand to discourse in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), that takings from a protected source such as a copyrighted play can occur at varying levels of abstraction from the concrete realization of the original, and that the more remote in abstraction the taking is from the original, the less likely that it will constitute a taking of protected expression.[14] This has often been referred to as

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of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C.A. § 102(b) (West 1977).

[13] As Judge Walker pointed out in *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992), "the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation. In applying the federal act to new types of cases, courts must always keep this symmetry in mind."

[14] His classic and oft-repeated formula was that:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and

Hand's "abstractions test"; in fact, as Judge Hand and others have noted,[15] it is no test at all, but merely a way of perceiving the problem.[16]

This conflict between these contradictory thrusts recurs at the level of several more particular applications of the copyright law. Among them is the issue raised by this

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> more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

45 F.2d at 121.

[15] "[A]s soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that . . . the decisions cannot help much in a new case." *Nichols*, 45 F.2d at 121. *See also Nash v. CBS Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990) ("Hand's insight is not a test at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality." (Easterbrook, J.)).

[16] Hand himself, writing thirty years after his above-quoted formulation of the problem, eschewed any pithy solution of it. In his last copyright case, *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960), he opined that: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*." *Id.* at 489. Thirty years after that, Judge Keeton wrote: "It seems the better part of wisdom, if not valor, not to press the search for a suitable bright-line test . . . where Learned Hand, even after decades of experience in judging, found none." *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 60 (D. Mass. 1990). *See also* Patry, *supra*, at 320 (dangerous to attempt to formulate broad rules in this area).

appeal of the protection, if any, to be accorded to compilations.[17] For if CCC's argument prevails, for reasons explained below, virtually nothing will remain of the protection accorded by the statute to compilations, notwithstanding the express command of the copyright statute.

Given the nature of compilations, it is almost inevitable that the original contributions of the compilers will consist of *ideas*.[18] Originality in *selection*, for example, will involve the compiler's idea of the utility to the consumer of a limited selection from the particular universe of available data. One compiler might select out of a universe of all businesses those that he believes will be of interest to the Chinese-American community, *see Key Publications*, 945 F.2d at 514, another will select those statistics as to racehorses or pitchers that are believed to be practical to the consumer in helping to pick winners, *see Kregos*, 937 F.2d 706-07; *Wabash Publishing Co. v. Flanagan*, No. 89 Civ. 1923, 1989 U.S. Dist. LEXIS 3546 (N.D. Ill. Mar. 31,

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[17] Another is the issue of the protection to be afforded to computer programs, as to which the recently conferred statutory protection is not easily reconciled with the judge-made, and statutorily adopted, principle that copyright protection does not "extend to any idea, procedure, process [or] system." 17 U.S.C. § 102(b). It is difficult to say what a computer program is, if not an idea, procedure, process or system. *See generally, Computer Assoc. Int'l. Inc. v. Altai*, 982 F.2d at 703-07.

[18] Commentators have noted this dilemma. *See, e.g.* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 Colum. L. Rev. 338, 346 (1992).

1989) (particular selection and arrangement of information relevant to horse races found copyrightable); *Triangle Publishing. Inc. v. New England Newspaper Publication Co.*, 46 F. Supp. 198, 201-02 (D. Mass. 1942) (same); another will offer a list of restaurants he suggests are the best, the most elegant, or offer the best value within a price range.[19] Each of these exercises in selection represents an *idea*.

In other compilations, the original contribution of the compiler will relate to ideas for the coordination, or arrangement of the data. Such ideas for arrangement are generally designed to serve the consumers' needs, making the data more useful by increasing the ease of access to those data that answer the needs of the targeted customers, or dividing the data in ways that will efficiently serve the needs of more diverse groups of customers. For example, a listing of New York restaurants might be broken down by geographic areas of the city, specialty or type (e.g., seafood, steaks and chops, vegetarian, kosher, Chinese, Indian); price range; handicapped accessibility, etc.).

It is apparent that virtually any independent creation of the compiler as to selection, coordination, or arrangement will be designed to add to the usefulness or desirability of his compendium for targeted groups of potential customers, and will represent an idea. In the case of a compilation, furthermore, such structural ideas are likely to be expressed in the most simple, unadorned, and direct fashion. If, as CCC argues, the doctrine of merger permits the wholesale

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[19] For a more exhaustive list of compilations upheld as original, *see* Patry, *supra*, at 199-200.

copier of a compilation to take the individual expression of such ideas, so as to avoid the risk that an idea will improperly achieve protection, then the protection explicitly conferred on compilations by Section 103 of the U.S. Copyright Act will be illusory.

We addressed precisely this problem in *Kregos*, 937 F.2d 700. The plaintiff Kregos had created a form to be used to help predict the outcome of a baseball game by filling in nine statistics of the competing pitchers. The defendant contended, in terms similar to CCC's argument, that the copyright owner's idea was the utility of the nine selected statistics in helping a fan predict the outcome, and that the idea was merged in the expression of it -- in the copyrighted form that listed those nine statistics. Judge Newman wrote:

> In one sense, every compilation of facts can be considered to represent a merger of an idea with its expression. Every compiler of facts has the idea that his particular selection of facts is useful. If the compiler's idea is identified at that low level of abstraction, then the idea would always merge into the compiler's expression of it. Under that approach, there could never be a copyrightable compilation of facts.[20]

Kregos, 937 F.2d at 706.

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[20] Judge Newman might have omitted the last two words. For the reasoning he discusses would destroy all protection for compilations of ideas as well as for compilations of facts.

Recognizing that the purpose of the doctrine of merger of expression with idea is to insure that protection not extend to ideas, the *Kregos* opinion went on to describe different categories of ideas. It distinguished between, on the one hand, those ideas that undertake to advance the understanding of phenomena or the solution of problems, such as the identification of the symptoms that are the most useful in identifying the presence of a particular disease; and those, like the pitching form there at issue, that do not undertake to explain phenomena or furnish solutions, but are infused with the author's taste or opinion. *Kregos* postulated that the importance of keeping ideas free from private ownership is far greater for ideas of the first category, directed to the understanding of phenomena or the solving of problems, than for those that merely represent the author's taste or opinion and therefore do not materially assist the understanding of future thinkers.[21] As to the latter category, the opinion asserted that, so long as the selections reflected in the compilation "involve matters of taste and personal opinion, there is no serious risk that *withholding the merger doctrine*," 937 F.2d at 707 (emphasis added), would inflict serious injury on the policy underlying the rule that forbids granting protection to an idea. This was in contrast to analyses belonging to the first category -- building blocks of understanding -- as to which "protecting the [necessary] 'expression' of the selection would clearly risk protecting the

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[21] *See also Eckes*, 736 F.2d at 863 (upholding finding of infringement because list of premium cards "subjectively based").

idea of the analysis." *Id.* at 707.[22] Because Kregos's idea was of the soft type infused with taste or opinion, the court withheld application of the merger doctrine, permitting Kregos to exercise ownership. It accomplished this by assigning to the idea a different level of abstraction from the expression of it, so that the merger doctrine would not apply and the copyright owner would not lose protection.[23] ("His

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[22] This dichotomy between types of ideas is supported by the wording of various legislative pronouncements, which seem uniformly to contemplate denying protection to building-block ideas explaining processes or discoveries, and do not refer to expressions of subjective opinion. Thus, § 102(b) denies protection to any "idea, procedure, process, system, method of operation, concept, principle, or discovery." 37 C.F.R. § 202.1(b), in similar terms, denies protection to "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing." Copyright Office Circular 31 maintains that "Copyright protection is not available for "ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas, algorithms; or any concept, process [or] method of operation."

[23] Professor Robert Gorman has written that protection of compilations is more strongly suggested where the "works are more fanciful than functional, and where the selection criteria are driven by subjective and evaluative judgement . . ." Robert A. Gorman, *The* Feist *Case: Reflections on a Pathbreaking Copyright Decision*, 18 Rutgers Computer & Tech. L.J. 731, 751 (1992). *See also* Ginsburg, *supra*, at 345. *Compare Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (denying protection to historical theory explaining destruction of Hindenburg dirigible) *with Eckes*, 736 F.2d at 863 (granting protection to identification of "premium" baseball cards because of personal subjectivity of the selection). The *Hoehling* opinion justified the denial of protection to

'idea,' for purposes of the merger doctrine, remains the general idea that statistics can be used to assess pitching performance rather than the precise idea that his selection yields a determinable probability of outcome." 937 F.2d at 707.)

Kregos, thus, makes a policy judgment as between two evils. Unbridled application of the merger doctrine would undo the protection the copyright law intends to accord to compilations. Complete failure to apply it, however, would result in granting protection to useful ideas.[24] *Kregos* adopts a middle ground. In cases of wholesale takings of compilations, a *selective* application of the merger doctrine, withholding its application as to soft ideas infused with taste and opinion, will carry out the statutory policy to protect innovative compilations without impairing the policy that requires public access to ideas of a more important and useful kind.[25]

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historical analysis on the theory that "[k]nowledge is expanded . . . by granting new authors of historical works a relatively free hand to build upon the work of their predecessors." 618 F.2d at 980.

[24] Discussing merger in the context of computer programs, Nimmer points out that "[t]his line [for determining when an idea has become sufficiently delineated to warrant copyright protection] is a pragmatic one, drawn not on the basis of some metaphysical property of 'ideas,' but by balancing the need to protect the labors of authors with the desire to assure free access to ideas." *Nimmer*, § 13.03[F] at 13-128.

[25] *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("The guiding consideration in drawing the line is the preservation of the balance between competition and protection reflected in the patent and copyright laws. What is basically at stake is

Application of the *Kregos* approach to our facts leads us to the conclusion that the district court should, as in *Kregos*, have "*withheld*" the merger doctrine. As a matter of copyright policy, this was not an appropriate instance to apply the merger doctrine so as to deprive Red Book of copyright protection. The consequences of giving CCC the benefit of the merger doctrine are too destructive of the protection the Act intends to confer on compilations, without sufficient benefit to the policy of copyright that seeks to preserve public access to ideas.

In the first place, the takings by CCC from the Red Book are of virtually the entire compendium. This is not an

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the extent of the copyright owner's monopoly -- from how large an area of activity did Congress intend to allow the copyright owner to exclude others?"); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1464 (5th Cir.) *cert. denied*, 498 U.S. 952 (1990) ("To extend protection . . . would be to grant Kern River a monopoly of the idea for locating a proposed pipeline in the chosen corridor, a foreclosure of competition that Congress could not have intended to sanction through copyright law . . . ."). *See also Nash v. CBS, Inc.*, 899 F.2d 1537, 1540-42 (7th Cir. 1990); *Lotus Dev. Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 60-61 (D. Mass. 1990); *Nimmer*, § 13.03[B] at 13-78-80; Patry, *supra*, at 314-317.

Indeed, courts have consistently ruled in a manner that supports the distinction made in *Kregos*. *Compare Baker v. Selden*, 101 U.S. 99 (1880), and *Kern River*, *supra*, (copyright protection denied, based on merger doctrine, respectively to a system of double entry bookkeeping and the designation of the best available pipeline route from Wyoming to California), *with Eckes*, *supra*, and *Key*, *supra*, (granting protection to the identification of premium baseball cards and business establishments likely to be of interest to the Chinese-American community).

instance of copying of a few entries from a compilation. This copying is so extensive that CCC effectively offers to sell its customers Maclean's Red Book through CCC's data base. CCC's invocation of the merger doctrine to justify its contention that it has taken no protectible matter would effectively destroy all protection for Maclean's compilation.[26]

Secondly, the valuations copied by CCC from the Red Book are not ideas of the first, building-block, category described in *Kregos*, but are rather in the category of approximative statements of opinion by the Red Book editors. To the extent that protection of the Red Book would impair free circulation of any ideas, these are ideas of the weaker category, infused with opinion; the valuations explain nothing, and describe no method, process or procedure. Maclean Hunter makes no attempt, for example, to monopolize the basis of its economic forecasting or the factors that it weighs; the Red Book's entries are no more than the predictions of Red Book editors of used car values

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[26] In this circuit, consideration of the merger doctrine takes place in light of the alleged copying to determine if infringement has occurred, rather than in analyzing the copyrightability of the original work. *Kregos*, 937 F.2d at 705; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 916 (2d Cir. 1980). This approach is applauded by Nimmer as the "better view." 13.03[B] at 13-76 to -78. As we noted in *Kregos*, "[a]ssessing merger in the context of alleged infringement will normally provide a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea." *Kregos*, 937 F.2d at 705. In the instant case, for example, it is of consequence that we are confronted with wholesale copying *of* a compilation rather than some more limited copying *from* a compilation.

for six weeks on a rough regional basis. As noted above, Red Book specifies in its introduction that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle. Any guide book is a supplement to and not a substitute for expertise in the complex field of used vehicle valuation." This language is remarkably similar to our observation in *Kregos*, that the author "has been content to select categories of data that he obviously believes have some predictive power, but has left it to all sports page readers to make their own judgments as to the likely outcomes from the sets of data he has selected." 937 F.2d at 707.

The balancing of interests suggested by *Kregos* leads to the conclusion that we should reject CCC's argument seeking the benefit of the merger doctrine.[27] Because the ideas contained in the Red Book are of the weaker, suggestion-opinion category, a withholding of the merger doctrine would not seriously impair the policy of the copyright law that seeks to preserve free public access to ideas. If the public's access to Red Book's valuations is slightly limited by enforcement of its copyright against CCC's wholesale copying, this will not inflict injury on the opportunity for public debate, nor restrict access to the kind of idea that illuminates our understanding of the phenomena

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[27] As Nimmer points out, "There can be no First Amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression. The first amendment . . . does not offer a governmental subsidy at the expense of authors whose well-being is also a matter of public interest." *Nimmer*, *supra*, § 1.10[D] at 1-98 to -98.1.

that surround us or of useful processes to solve our problems.[28] In contrast, if the merger doctrine were applied so as to bar Maclean's enforcement of its copyright against CCC's wholesale takings, this would seriously undermine the protections guaranteed by § 103 of the Copyright Act to compilations that employ original creation in their selection, coordination, or arrangement. It would also largely vitiate the inducements offered by the copyright law to the makers of original useful compilations.

3. *Public domain.* We disagree also with the district court's ruling sustaining CCC's affirmative defense that the Red Book has fallen into the public domain. The district court reasoned that, because the insurance statutes or regulations of several states establish Red Book values as an alternative standard, *i.e.*, by requiring that insurance payments for total losses be at least equal either to Red Book value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed),[29] the Red Book has passed into the public domain. The argument is that the public must have free access to the

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[28] Others, including CCC, remain free to value used cars and to profit from their valuations. They are barred only from wholesale copying of what is original to the authors of the Red Book. As the Supreme Court said in *Mazer v. Stein*, 347 U.S. 201 (1954), "respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article." 347 U.S. at 218.

[29] See N.J. Admin. Code 11:3-10.4 (1988); 11 N.Y. Admin. Code § 216.7(c) (1990).

content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.

No authority cited by CCC directly supports the district court's view. It relied on *Building Officials & Code Adm. v. Code Tech. Inc.*, 628 F.2d 730 (lst Cir. 1980) ("BOCA"), which the Magistrate Judge found "virtually indistinguishable" from our case. Although the First Circuit Court of Appeals, in *BOCA*, indeed expressed sympathy with the arguments here advanced by CCC, its ruling is not a holding to that effect. The Court of Appeals merely vacated a preliminary injunction, expressing doubts as to the plaintiff copyright holder's likelihood of success, and remanding for a full hearing on whether the plaintiff had lost its copyright protection by reason of the adoption of its previously protected work (a construction code) as part of the laws of Massachusetts.

We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC's argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. We note also that for generations, state education systems have assigned books under copyright to comply with a mandatory school curriculum. It scarcely extends CCC's argument to require

that all such assigned books lose their copyright -- as one cannot comply with the legal requirements without using the copyrighted works. Yet we think it unlikely courts would reach this conclusion. Although there is scant authority on CCC's argument, Nimmer's treatise opposes such a suggestion as antithetical to the interests sought to be advanced by the Copyright Act. *See Nimmer* § 5.06[C] at 5-60.[30]

Conclusion

Because Maclean has demonstrated a valid copyright, and an infringement thereof, we direct the entry of judgment in Maclean's favor. We remand to the district court for further proceedings.

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[30] Nimmer argues that the adoption of a private work into law might well justify a fair use defense for personal use, but should not immunize a competitive commercial publisher from liability since this would "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes." *Nimmer*, § 5.06[C] at 5-60.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of December one thousand nine hundred and ninety-four.

PRESENT: HONORABLE AMALYA L. KEARSE
HONORABLE LAWRENCE W. PIERCE
HONORABLE PIERRE N. LEVAL,
Circuit Judges.

CCC INFORMATION SERVICES, INC.,
Plaintiff-Appellee,

v. 93-7687

MACLEAN HUNTER MARKET REPORTS, INC.,
Defendant-Appellant,

CREATIVE AUTOMATION CO.,
Defendant.

Appeal from a judgment of the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of the District Court is reversed and the action be and it hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court and with instructions to enter judgment in favor of defendant on its counterclaims alleging copyright infringement.

GEORGE LANGE III, Clerk
By:
/s/ Edward J. Guardaro

Edward J. Guardaro
Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of March one thousand nine hundred and ninety-five.

CCC INFORMATION SERVICES, INC.,
Appellee

v. Dkt No: 93-7687

MACLEAN HUNTER MARKET REPORTS, INC.,
Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee CCC INFORMATION SERVICES, INC.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell
Carolyn Clark Campbell,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COPYRIGHT CLAIMS (DOC.NO.111) AND DEFENDANT'S (MACLEAN HUNTER MARKET REPORTS, INC.) MOTION FOR PARTIAL SUMMARY JUDGMENT ON COPYRIGHT ISSUES (DOC. NO. 136)

Plaintiff CCC Information Services, Inc. ("CCC"), a company in the business of providing local market automobile valuation information to, *inter alia*, insurers and financial institutions, brought this action under federal copyright law, 17 U.S.C. § 101 *et seq.*, for declaratory

judgment of invalidity and noninfringement of copyrights held by defendant Maclean Hunter Market Reports, Inc. ("Maclean Hunter") in the "Automobile Red Book Official Used Car Valuations" ("Red Book"). Maclean Hunter counterclaimed under 17 U.S.C. § 501 *et seq.* for infringement of asserted exclusive rights to the Red Book, requesting injunctive relief and monetary damages. CCC interposed twelve affirmative defenses to the counterclaim. CCC moves for summary judgment on its complaint for declaratory judgment and on Maclean Hunter's counterclaim. Maclean Hunter also moves for summary judgment on CCC's complaint and, additionally, on CCC's twelve affirmative defenses.

Summary judgment may only be granted if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P., Rule 56(c). The court's function is not to resolve material fact issues, but simply to determine if such issues exist, *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4 (2 Cir. 1983), and as long as they do not, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Summary judgment may be an appropriate disposition in copyright cases where there is undisputed direct evidence of copying and infringement may be determined as a matter of law. *Rogers v. Koons*, 960 F.2d 301, 307 (2 Cir.), *cert. denied*, 113 S.Ct 365 (1992). For example, if the only similarity between two works is of noncopyrightable elements, summary judgment may be granted. *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1072 (2 Cir. 1992) (citations omitted).

The following facts are evident from the well-developed pre-trial record and are not disputed by the parties. Maclean Hunter and its predecessors have published the Red Book since 1911. The Red Book lists valuations of domestic and imported used cars and trucks that are seven years old or less in the form of tables of data identifying vehicles by make, model, model number, body style, engine and transmission. The automobile manufacturers are listed alphabetically by year within each section and the models are listed chronologically within each manufacturer's section, beginning with the latest model year. The Red Book provides the average wholesale value, average retail value and average finance (loan) value for each vehicle, and also contains separate sections on selections of options, option valuations and mileage categories which customers use to adjust vehicle valuations according to the mileage and options on particular vehicles. The listed cars and trucks comprise an estimated 98% of all used vehicles available. Maclean Hunter maintains a computerized program of its valuations which it revises for the publication of each Red Book.

Maclean Hunter arrives at the valuations and selections contained in the Red Book by gathering and reviewing information from the following sources: (1) discussions with vehicle sales personnel, dealers and manufacturers' representatives; (2) weekly reports on automotive production figures; (3) used car auction reports and attendance at auctions; (4) industry publications, including an automotive yearbook, statistics and valuations in other guidebooks; and (5) research into economic trends and the automotive industry. Maclean Hunter represents that all information in

the Red Book "has been obtained from reliable sources", "has been most carefully compiled" and "is believed to be correct". CCC's Memorandum in Support of its Motion for Summary Judgment ("CCC Mem."), Exh. C.

The Red Book is currently published eight times per year for three different regions of the United States (Regions A, B and C) and for the State of Wisconsin. Annual subscriptions to the Red Book approximate fifty thousand and an additional fifteen or twenty thousand customers request single copies. Customers are predominantly insurance companies, banks and lending institutions, new and used car dealers, taxing authorities, departments of welfare and public libraries. These entities primarily use the Red Book to place a dollar value on automobiles for sale and purchase transactions, financing, insurance settlements and tax assessments.

Each edition of the Red Book also contains some advertising for other Maclean Hunter publications and explanatory text, including the following prefatory language to describe the contents and purpose of the Red Book:

> "Valuation are based on a thorough study of the used car market . . .
>
> Red Book contains the publishers' projected estimates of used vehicle values. While we consult various market sources for data, including actual prices paid for comparable vehicles in the market place, we do not report actual market prices because we believe them to be out of date and invalid for the future period we are

valuing. Rather, as a guide-book, we project to the best of our ability vehicle values for the future period(s) covered by each edition.

You, the subscriber, must be the final judge of the actual value of a particular vehicle."

Id.

Since about 1914, each edition of the Red Book has been registered with the U.S. Copyright Office and has included a copyright notice. Maclean Hunter's Appendix in Support of Motion for Partial Summary Judgment on the Copyright Issues ("Def. App."), A-882. Since 1983, each Red Book has contained a written warning against any form of reproduction, including by computer or electronics.

The Red Book is cited in the statutes and regulations of many states. Connecticut, New Jersey, New York and Pennsylvania have each designated the Red Book as an authorized source for calculating "total loss" valuation for insurance purposes. Connecticut specifically requires an insurer, when calculating the value of a vehicle declared to be a total loss, to use not less than the average of the retail values of the insured vehicle as listed in the National Automobile Dealers Association ("NADA") Official Used Car Guide and one other approved source. Conn. Gen. Stat. § 38a-353. As of December 1992, Red Book, CCC's Local Market Valuation Service (described below) and a third valuation guide, Automatic Data Processing Autotrak, are approved second sources for calculating the value of a damaged vehicle which has been declared a constructive total

loss. State of Connecticut Insurance Department Bulletin No. IC-10. Additionally, other states explicitly permit or require the use of Red Book valuations for other purposes, such as for tax assessment. See CCC Mem., Exh. E.

CCC provides current local market vehicle valuation calculations to insurance companies and other businesses requiring up-to-date valuations of vehicles. CCC provides over 100,000 computer-generated calculations based on vehicle valuations per month. One service offered by CCC is Computerized Valuation Service ("CVS") (described above as Local Market Valuation Service). CVS provides valuations of total loss vehicles using CCC's local market database which is formulated from CCC's own information-gathering resources. CCC field representatives visit automobile dealerships, collect information about inventory and sales and then develop vehicle descriptions. CCC then produces individualized local market reports for insurance clients listing vehicle valuations and comparable vehicles within the requested price range. CCC provides its CVS customers with the option of receiving a Red Book figure to compare with the CVS valuation result. CVS is employed in those states which do not specify or require a particular source for valuation information.

In Connecticut, New Jersey, New York and Pennsylvania, which require use of "official" valuation sources for calculating insurance total losses, CCC offers a service called VINguard Valuation Service ("VVS") to provide total loss calculations and valuation averages. While VVS is based on CCC's own vehicle descriptions and formatted database, in producing the service, CCC uses

numerical data from the Red Book and the NADA Official Used Car Guide to calculate vehicle valuations. Red Book information contained in the VVS database includes retail and wholesale valuations of used vehicles and valuations for certain optional equipment and mileage adjustments. Def. App. A-274 to A-277, A-458(e)-(h) and A-758 to A-760. CCC's "Price File Update Listings" contain automobile valuations for Regions A and B. Def. App. A-106 to A-225. CCC has a subscription to the Red Book.

The parties' relationship began in 1981 when CCC first pursued a license from Maclean Hunter's predecessor, National Market Reports ("National"), to use Red Book valuations in computer tape form. In 1982, CCC proposed to National that they enter into a formal written agreement whereby National would grant to CCC an exclusive license to use Red Book data in exchange for an initial fee of $500. No such agreement was reached. Discussions ceased and, in July 1983, believing that CCC was making unauthorized use of its proprietary vehicle valuations, National sued CCC in the U.S. District Court for the Northern District of Illinois for infringement of three federally registered copyrights dated March, 1983. The suit was settled two weeks later pursuant to a consent agreement wherein CCC agreed not to employ or utilize National's trademarks, including the designations and trademarks "Red Book" and "Red Book Price". Each party released the other from all actions or claims arising out of the subject matter of the complaint.

After the 1983 settlement, the parties continued to dispute CCC's use of Red Book data and the occurrence of any impermissible appropriation. In 1990, CCC offered to pay

$650,000 for a license from Maclean Hunter to use the Red Book computer tapes. Maclean Hunter rejected the offer. In another effort to obtain Red Book data in computerized form, CCC made a bid for the assets of a company called Statistical Tabulating Company ("Stat:Tab") in Stat:Tab's 1990 bankruptcy proceeding. Stat:Tab enjoyed an exclusive license with Maclean Hunter and a non-exclusive license with NADA to produce VISTA, a software program averaging valuations published in the Red Book and the NADA guide. The bankruptcy court ultimately approved a sale of Stat:Tab's assets, including VISTA, to defendant Creative Automation Company ("Creative"). Creative offered VISTA until December 1991.

CCC alleges that the Red Book's copyrights and Creative's licenses are invalid and unenforceable because the Red Book contains unprotected statements of fact and because its selection and organization are obvious and unoriginal. CCC agrees that Maclean Hunter gathers information from various sources and the Red Book is based in part on Red Book editors' individual judgment and experience, but submits that the resultant valuations are mere interpretations of facts, items having an "objective reality" which are not protected by copyright.

Maclean Hunter's counterclaim for copyright infringement alleges that CCC publishes and commercially markets data copied from works protected by copyright. Maclean Hunter maintains that the valuations and selections regarding vehicles, options, mileage and regions are its original creations insofar as they are matters of opinion and judgment. Maclean Hunter also asserts that the valuations

cannot be "discovered facts" because there is no evidence that the data exists elsewhere. Maclean Hunter seeks an order permanently enjoining CCC from infringing copyrights of Red Book and from publishing, selling, marketing or otherwise disposing of any work infringing Red Book's copyrights, and requiring CCC to produce all infringing copies for destruction.

CCC asserts the following affirmative defenses to Maclean Hunter's claim of infringement: (1) CCC used the Red Book consistent with its intended purpose; (2) CCC used the Red Book such as to constitute a "fair use" under 17 U.S.C. § 107; (3) the Red Book is in the public domain; (4) the Red Book contains numerical statements of fact which are not copyrightable material; (5) the Red Book is not the subject of valid copyright registration; (6) Maclean Hunter's copyrights are unenforceable because of copyright misuse; (7) Maclean Hunter has waived any right to claim infringement against CCC because it knew of and condoned CCC's use of alleged copyrighted material; (8) Maclean Hunter is estopped from asserting infringement against CCC because it permitted CCC to continue its business; (9) Maclean Hunter is guilty of laches; (10) Maclean Hunter released any claim of infringement in the 1983 settlement agreement; (11) the statute of limitations bars infringement claims more than three years old; and (12) Maclean Hunter is barred by the doctrine of res judicata. CCC's Reply to Maclean Hunter's Counterclaim.

To prove a claim of copyright infringement, Maclean Hunter must establish two elements: (1) ownership of a valid copyright; and (2) copying of copyrightable elements of the

work. *Key Publications, Inc. v. Chinatown Today Pub. Enterprises, Inc.*, 945 F.2d 509, 514 (2 Cir. 1991) (citation omitted). The Copyright Act of 1976 makes a certificate of copyright registration prima facie evidence of the valid ownership of a copyright, see 17 U.S.C. § 410(c), although that presumption of ownership may be rebutted by a showing that the registered works are not copyrightable. *Rogers v. Koons*, *supra*, 960 F.2d at 306. Indeed, validity will not be assumed where other evidence in the record casts doubt on the copyrightable nature of the work. *Merritt Forbes & Co. Inc. v. Newman Inv. Securities, Inc.*, 604 F. Supp. 943, 948 (S.D.N.Y. 1985). To prove copying, a plaintiff must establish that the defendant had "access" to the copyrighted work and that defendant's work is "substantially similar" to plaintiff's work. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2 Cir.), *cert. denied*, 476 U.S. 1159 (1986). See also *Manufacturers Technologies, Inc. v. Cams, Inc.*, 706 F. Supp. 984, 990 (D. Conn. 1989) (Daly, J.).

Both elements necessary to establish copyright infringement are disputed by CCC and Maclean Hunter. CCC's position is that Maclean Hunter's copyrights are not valid because none of the Red Book is eligible for copyright protection but, in any event, CCC uses noncopyrightable material in its valuation business. With respect to the first element, because the Red Book contains some foreword text and advertisements containing original material, it is, considered as a whole, subject to a valid copyright. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, ___ U.S. ___, 111 S. Ct. 1282 (1991).

The real question is whether Maclean Hunter has proved the second element. Defendant asserts that everything plaintiff has adopted from the Red Book is copyrightable. CCC states that perhaps, at the very most, Maclean Hunter's copyrights extend only to the selection and arrangement of valuation data in the Red Book, but because CCC does not copy any selection or arrangement from the Red Book, its use of Red Book information is not an infringing use. Here, CCC's "copying" of the Red Book's valuation data is undisputed. CCC subscribes to the Red Book and openly admits its use of Red Book valuations to generate the VVS product and its offer to provide CVS customers with Red Book data for comparative purposes. Therefore, the first copyright issue presented is whether the material from the Red Book used by CCC merits copyright protection. If this material is properly protected by copyright law, the next level of inquiry addresses the existence of any cognizable defense to the copying, thereby precluding a finding of infringement.

To qualify for copyright protection, a work must be original to its author. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-549 (1985). Originality is a constitutional and statutory requirement. See United States Constitution, Article I, Section 8, Clause 8 (Congress has the power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Copyright Act of 1976, 17 U.S.C. § 101 *et seq*. Copyright confers monopolistic rights to publish, copy and distribute an original work. *Harper & Row, supra*, 471 U.S. at 546-547. For example, a copyright holder has the right to grant or refuse to grant a license to

someone who seeks use of the copyrighted material. These rights are intended to encourage creative activity and promote the dissemination of ideas. *Id.* at 556.

Pursuant to the Copyright Act, copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work". 17 U.S.C. § 102(b). In this way, copyright law does not restrict freedom of speech because it protects only the form of expression and not the idea expressed. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 141 (2 Cir. 1992) (citations omitted). Indeed, this "idea-expression dichotomy" is at the core of copyright law. *Manufacturers Technologies*, 706 F. Supp. at 993. As a matter of law, infringement will not be found where the similarity between two works is that of an abstract idea, rather than the expression of that idea. *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2 Cir. 1984).

Moreover, facts and interpretations of facts are not copyrightable. *Merritt Forbes*, *supra*, 604 F. Supp. at 950 (citing 1 Nimmer on Copyright, § 2.11[A]). And, because copyright is limited to expression, that aspect of a work which displays the stamp of originality, an original expression of facts is copyrightable even where the facts themselves are not. *Arica*, *supra*, 970 F.2d at 1075. Copyright does not prevent copying of those elements of a work that are not original such as "quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain -- as long as such

use does not unfairly appropriate the author's original contributions". *Harper & Row, supra*, 471 U.S. at 548.

In a landmark copyright decision, the Supreme Court explained that "[o]riginal, as the term is used in copyright, means only that a work is independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity". *Feist, supra*, 111 S. Ct. at 1287 (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990)). Indeed, the Court previously defined author as "originator" or one to whom any "physical rendering of the fruits of creative intellectual or aesthetic labor" owes its origin. *Goldstein v. California*, 412 U.S. 546, 561 (1973). Original works of authorship warranting copyright protection may be "fixed in any tangible medium of expression", including literary works. 17 U.S.C. § 102(a). The Copyright Act broadly defines literary works as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia . . .", 17 U.S.C. § 101, which includes catalogs, directories and similar factual, reference or instructional works as well as compilations of data. *Merritt Forbes, supra*, 604 F. Supp. at 948 (citing House Report on the Copyright Act of 1976, Report No. 94-1476, U.S. Code Cong. & Admin. News 1976 at 5659, 5666). It appears then that the Red Book qualifies as a literary work.

No court in this jurisdiction has addressed the issue of whether vehicle valuations are the proper subject for copyright protection. The Eastern District of Virginia considered an analogous case, *N.A.D.A Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44 (E.D. Va.

1986), in which NADA's claim for copyright infringement failed. Defendant Business Data of Virginia ("BDV") used copies of the NADA Guides to assess vehicle values and prepare documents for the Virginia government to use for personal tax return purposes. BDV produced tapes which were essentially computerized versions of the factual information contained in the NADA Guides. The court found that, had BDV sold its tapes, it would most likely have constituted infringement of NADA's copyright in the NADA Guides; however, the court concluded instead that NADA was trying to protect BDV's use of the factual information contained in the Guides. But cf. *NADA Services Corp. v. CCC Information Services, Inc.*, No. 91 C 4593, 1991 WL 287961, at *2 (N.D. Ill. Nov. 15, 1991) (without reaching the merits, the court indicated that NADA had "some likelihood of prevailing on its theory the numbers themselves are protectable under the Copyright Act").

The Supreme Court's decision in *Feist* also is instructive. Notwithstanding the extremely low level of creativity required for copyright protection, the Court held that the names, towns and telephone numbers listed in a combined white and yellow pages telephone directory did not warrant copyright protection. Because the information had an existence apart from the directory and did not owe its origin to the publisher, the Court found that it was simply a collection of uncopyrightable facts. *Feist* soundly rejected the once fashionable "sweat of the brow" doctrine, see generally *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2 Cir. 1922) (outlining now-repudiated sweat of the brow test) which rewarded the hard work that went into collecting and compiling facts.

Stating that there is "nothing remotely creative about arranging names alphabetically in a white pages directory", the *Feist* Court denied copyright protection to the directory noting that "copyright rewards originality, not effort". Also illustrative is *Kregos v. Associated Press*, 937 F.2d 700 (2 Cir. 1991), where the Second Circuit held that statistics devised from information concerning past performances of pitchers were not eligible for copyright protection. Like the Red Book, the statistics were calculated from underlying data and while they were not themselves "discovered facts", they were generated from discovered facts.

Maclean Hunter has not persuasively demonstrated that the values published in the Red Book are anything more than interpretations or analyses of factual information which have been gathered by the Red Book staff. Clearly, the valuations embody an idea -- that of the ability to place a dollar value on a used car or truck -- but they do not constitute an original expression of that idea. In view of the undisputed evidence of other documents and factual sources upon which the Red Book is based, the valuations certainly appear to be nothing more than unprotected derivations and analyses of preexisting material. See, e.g., *Merritt Forbes*, *supra*, 604 F. Supp. at 952 (analyzing originality of bond underwriting documents). While Maclean Hunter may have been the first to discover and report this material, the material does not "owe its origin" to Maclean Hunter. *Feist*, *supra*, 111 S. Ct. at 1296 (citation omitted). Therefore, the originality requirement has not been satisfied with respect to the Red Book valuations.

Originality may also be found in the selection and ordering of particular facts or elements. *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204 (2 Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). In this way, a factual compilation, in contrast to solitary facts, is eligible for copyright if it features an original selection or arrangement of facts, but the copyright may not extend beyond the elements which originated with the compiler. *Feist*, *supra*, 111 S. Ct. at 1290. In order for a work to qualify as a copyrightable compilation, three elements must be present: (1) the collection and assembly of pre-existing material, fact or data; (2) the selection, coordination or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination or arrangement, of an "original" work of authorship. *Id.* at 1293. Despite widespread recognition of compilation copyright, the Supreme Court has warned that a copyright in a factual compilation is "thin" and denied protection to the arrangement of information in the *Feist* directory. *Id.* at 1289. But cf. *Key Publications*, *supra*, 945 F.2d at 514 (agreeing with *Feist* that a copyright in a factual compilation is thin, but stressing that it is not "anorexic", the Second Circuit distinguished *Feist* and held that the arrangement of a yellow pages directory for Chinese-American businesses involved "de minimis" creativity in deciding which names and categories to include, and thus plaintiff's copyright was valid).

Maclean Hunter asserts that CCC copies not only the actual contents of the Red Book, but also their selection and arrangement. In this regard, Maclean Hunter points out that CCC uses Red Book's material on options and also arranges

vehicle information into Regions A and B. Whether option information and column labels "Region A" and "Region B" constitute selection and arrangement is unclear, but accepting Maclean Hunter's argument as true for purposes of this discussion, there still would be no copyright infringement because the Red Book's selection and arrangement of vehicle information are not original. The valuation data included in the Red Book is a logical response to the needs of the vehicle valuation market. Because Maclean Hunter intends for the Red Book to be as comprehensive as possible and readily admits that it contains data on nearly all used cars and trucks available, the author's selection of information "lacks the modicum of creativity necessary to transform mere selection into copyrightable expression". *Feist*, *supra*, 111 S. Ct. at 1296. Maclean Hunter does not exercise sufficient judgment and discretion in determining which items to list in the Red Book, critical elements to compilation copyright. See, e.g., *Financial Information*, *supra*, in which the Second Circuit affirmed the district court's finding, after trial and remand, that a financial publisher's "Daily Bond Cards" (print-outs of municipal bond redemption information) were not original works of authorship. The cards did not qualify for copyrightable compilation based on the format utilized because little independent creation went into "filling in" five facts on each card. *Id.* at 207. But cf. *Eckes v. Card Prices Update*, *supra*, 736 F.2d at 863 (due to evidence that plaintiffs "exercised selection, creativity and judgment in choosing among the 18,000 or so different baseball cards in order to determine which were the 5,000 premium cards" to list in a guidebook, the guide merited protection under the copyright laws on the basis of original compilation); *Kregos*, *supra*,

937 F.2d at 704 (in choosing nine items for a pitching form out of the universe of known facts available, which was "considerably greater" than nine, plaintiff displayed requisite selectivity).

The arrangement of the Red Book is rather mechanistic. The alphabetical and chronological display of information is designed for convenience, to make it as "[e]asy as possible to find a car". CCC Mem., Exh. C at 142-143. Indeed, like the telephone book's ordering of facts in *Feist*, the format of the Red Book is a "convention". *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F.2d 671 (2 Cir. 1991). In *Victor Lalli*, defendant's use of charts tracking the historical record of winning numbers at local race tracks was not infringing because the charts did not feature original selection, coordination or arrangement insofar as they were "purely functional grids . . . offer[ing] no opportunity for variation". *Id.* at 673. Additionally, the *Kregos* court denied copyright protection to the arrangement of selected statistics, describing the pitching form as "garden-variety" based on its use of columns and categorical and chronological organization. *Kregos*, *supra*, 937 F.2d at 705.

The pre-trial evidentiary record here indicates that the information contained in the Red Book is the product of research, calculation and compilation. Indeed, it is obvious that a fair amount of effort and labor goes into the publication of each Red Book; however, Maclean Hunter's toil in producing the Red Book is irrelevant to the question of whether the work is original enough to qualify for copyright protection. The undisputed facts indicate that

copyright law neither protects the Red Book's valuations nor its selection and arrangement of data, all of which may be freely used by subsequent authors. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2 Cir.), *cert. denied*, 449 U.S. 841 (1980). Therefore, CCC's incorporation of Red Book data into its own valuation reports does not constitute infringement.

The copyright doctrine of merger further precludes a finding of infringement. The merger doctrine provides that expression of an idea is not protected where there is only one or so few ways of expressing an idea that protection of the expression would effectively protect the idea itself. *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-708 (2 Cir. 1992) (citations omitted). This doctrine determines whether actionable infringement has occurred, not whether a copyright is valid, and is designed to prevent monopolies over ideas. *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5 Cir.), *cert. denied*, 498 U.S. 952 (1990). The Second Circuit has instructed that application of the doctrine of an idea merging with its expression depends on the level of abstraction at which the idea is formulated, stating:

> "As long as selections of facts involve matters of taste and personal opinion, there is no serious risk that withholding the merger doctrine will extend protection to an idea . . . . However, where a selection of data is the first step in an analysis that yields a precise result or even a better-than-average probability of some result, protecting the 'expression' of the selection would clearly risk protecting the idea of the analysis."

Kregos, *supra*, 937 F.2d at 707.

Here, Maclean Hunter represents that the information contained in the Red Book is believed to be correct and titles the guide "Official Used Car Valuations". CCC Mem., Exh. C. Moreover, regulations of the federal government and more than half of the states in this country reference the Red Book as an official source of vehicle valuations. CCC Mem., Exh. E. Maclean Hunter has taken steps to have the Red Book designated as an official valuation guide for insurance purposes in certain states. CCC Mem., Exh. 2 at 41-65. Based on this evidence, it appears that Maclean Hunter's selection of information used to formulate used car and truck values is designed to yield a rather precise result and the numerical data is "necessarily incidental" to the idea of valuing used vehicles. *Altai*, *supra*, 982 F.2d at 707. Also, practically speaking, there really is only one accessible way to express the idea of an item's value -- through the use of a number. Maclean Hunter does not deny this practicality. CCC Mem., Confidential Exh. O at 217. See generally *Matthew Bender & Co., Inc. v. Kluwer Law Book Publishers, Inc.*, 672 F. Supp. 107 (S.D.N.Y. 1987) (application of merger doctrine to charts of information relating to personal injury and wrongful death awards and settlements due to limited number of ways to present the information).

Next, CCC's affirmative defenses to Maclean Hunter's counterclaim of infringement are discussed to the extent they are not repetitive of the foregoing. CCC submits that even if its use of the Red Book were otherwise deemed an infringing use, it prevails on a "fair use" defense pursuant to

17 U.S.C. § 107. Fair use is a privilege to use copyrighted material in a "reasonable manner" without the owner's consent when certain circumstances exist. The fair use doctrine is designed to balance the "exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern . . . ." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2 Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). While the doctrine is not "a license for corporate theft", *Iowa State Univ. Research Foundation, Inc., v. American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2 Cir. 1980), it does permit use of a copyrighted material for nonprofit educational purposes such as criticism, comment, news, reporting, teaching, scholarship and research. 17 U.S.C. § 107. Determining the applicability of the fair use defense requires analysis and "equitable consideration", *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 508 (2 Cir. 1984), of the following four factors:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. § 107(1)-(4).

If the use is commercial, there is a presumption against fair use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), *rehearing denied*, 465 U.S. 1112 (1984). There is no question that CCC's use is commercial, and presumptively unfair. Plaintiff submits that any initial presumption against fair use is rebutted by the fact that it is required to use Red Book information in providing a product to its customers that complies with state statutes and regulations. This use, however, does not serve the doctrine's purpose of fostering creativity. *Iowa State University Research Foundation*, 621 F.2d at 60.

The second factor -- the nature of the copyrighted material -- weighs against the asserted claim of fair use given the for-profit purpose of the Red Book and the similarly noncreative and commercial manner in which CCC uses the Red Book. *Financial Information*, 751 F.2d at 509. Had CCC intended to put Red Book data to an artistic purpose entirely unrelated to the vehicle valuation business or offered some criticism of or comment upon the Red Book, its assertion of fair use might be more compelling, but in these circumstances, it sounds a bit like the pot calling the kettle black. *Id.*

The third factor -- the amount and substantiality of the copyrighted material copied -- also weighs against fair use. CCC inputs Red Book's retail, wholesale, option and mileage valuations into its computer database of VVS reports, material which Maclean Hunter characterizes as the "most important" part of the work. CCC characterizes the material as a "small fraction" of its total output. But even if CCC's use is in fact *de minimis*, "no plagiarist can excuse

the wrong by showing how much of his work he did not pirate", *Harper & Row, supra*, 471 U.S. at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2 Cir.) *cert. denied*, 298 U.S. 669 (1936)).

The fourth fair use factor -- the effect of the use upon the potential market for or value of the copyrighted work -- is the single most significant element of fair use inquiry. *Harper & Row, supra*, 471 U.S. at 566. "Fair use . . . is limited to copying by others which does not materially impair the marketability of the work which is copied". *Id.* at 566-567 (quoting 1 Nimmer § 1.10[D] at 1-87). The pre-trial record here evidences cancellations of subscriptions to the Red Book by former Maclean Hunter customers who decided to instead use CCC's services. Def. App. A-889-902. To negate fair use, a defendant need only show that if plaintiff's use became widespread, it would adversely affect the *potential* market for the copyrighted work. *Sony Corp. of America*, 464 U.S. at 451. Maclean Hunter's showing of adverse effect on the *existing* market (and presumably the potential market as well) for the Red Book is indeed a persuasive barometer of unfair use. But cf. *N.A.D.A. Services, supra*, 651 F. Supp. at 48 (fair use found where no evidence of market impairment).

CCC also asserts that its use of the Red Book is permissible under the "public domain" doctrine. Laws are in the public domain and, as such, are uncopyrightable. *Banks v. Manchester*, 128 U.S. 244 (1888). Due process requires that laws be accessible and available to the public and hence not be subject to copyright. *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 591 F. Supp. 726, 735

(N.D. Ill. 1983). In *NADA Services, supra*, 1991 WL 287961, at *4, the court denied NADA's motion for a preliminary injunction based in part on "a strong public domain argument". As expected, the facts here and in *NADA Services* are analogous. Various states require by law the use of the NADA Guide, like the Red Book, in vehicle valuations. The court's public domain analysis emphasized the fact that the text of the NADA Guide changes monthly and thus, reference is the only practical way of incorporating the text of the Guide into the statute without constant revision. The Red Book is published approximately every six weeks. Because of the impracticality of statutory revision every six weeks, this matter is virtually indistinguishable from *Building Officials & Code Administrators International, Inc. v. Code Technology, Inc.*, 628 F.2d 730 (1 Cir. 1980), wherein state-promulgated administrative regulations incorporated the actual text of a privately developed building code which was held to be in the public domain. Moreover, the Red Book is virtually "indispensable to statutory compliance," *NADA Services, supra*, 1991 WL 287961, at *4.

A finding of public domain is further justified by the very real concern that public access to the Red Book could be impermissibly limited by Maclean Hunter's exercise of its right under copyright law to enforce a monopoly. While the Red Book is currently available by subscription, Maclean Hunter has the right, by virtue of its copyright, to chose not to license or distribute the Red Book at all. This element of copyright law cannot "be squared with the right of the public to know the law to which it is subject". *Building Officials, supra*, 628 F.2d at 735.

Plaintiff further asserts that Maclean Hunter is estopped from claiming infringement because it has committed copyright misuse by impermissibly extending its copyright monopoly. The defense of copyright misuse has generally been held not to exist. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1538 (S.D.N.Y. 1991) (citations omitted). While misuse may be found in cases where a copyright monopoly is broadened in an effort to restrain competition, generally an effort to set an industry standard in excess of fair use must be shown. *Id.* CCC's unsubstantiated statement that there is evidence "suggesting" that Maclean Hunter engaged in discriminatory licensing of the Red Book data is insufficient to make out a misuse defense.

Plaintiff's more "technical" defenses are unavailing as a matter of law. CCC claims that Maclean Hunter's infringement action is barred by the doctrines of waiver, estoppel and laches insofar as Maclean Hunter allegedly knew about CCC's business since 1983 and its VVS service since 1987 without objecting to CCC's conduct. CCC also asserts that it relied on Maclean Hunter's alleged acquiescence and is prejudiced by Maclean Hunter's failure to claim infringement until after plaintiff's suit was filed. The pre-trial record, however, is devoid of any material issues of fact as to these assertions. In 1987, Maclean Hunter made a written demand on CCC that it cease any copyright infringement and in 1989, Maclean Hunter issued a "To Whom It May Concern" letter stating that Stat:Tab and VISTA were the only authorized remarketers of the Red Book database and that any other use was in violation of the copyright laws. Def. App. A-653 to A-654, A-692 to

A-696. Additionally, Maclean Hunter's repeated printed warnings against reproduction of the Red Book belie any claim of waiver, estoppel or laches.

CCC further submits that the 1983 settlement agreement bars Maclean Hunter from asserting claims of copyright infringement. This argument is two-fold: first, CCC alleges that Maclean Hunter released CCC from all copyright claims and, second, CCC alleges that Maclean Hunter's claims are barred by res judicata. With respect to release, the parties in the 1983 action mutually released one another from all claims which arose from National's complaint. The copyrights which are the subject matter of the present litigation are for works in existence since 1988 and, therefore, are not within the scope of the 1983 agreement, to which Maclean Hunter was not a party.

For similar reasons, the doctrine of res judicata, which CCC accurately points out is designed to prevent repetitive litigation of the same claim, does not preclude defendants' copyright action. As a means of promoting judicial economy and certainty, "[r]es judicata will preclude relitigation of a claim where the earlier decision was a final judgment on the merits rendered by a court of competent jurisdiction, in a case involving the same parties or their privies, where the same cause of action is asserted in the later litigation". *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 639 (2 Cir.), *cert. denied*, 484 U.S. 992 (1987). CCC submits that the 1983 consent agreement between CCC and National resolved all copyright claims raised in National's 1983 complaint, and since the current Red Books contain the same "expression" as the Red Books at issue in 1983,

Maclean Hunter's present infringement claim is barred by res judicata. Maclean Hunter first points out that, by CCC's own representation, the 1983 litigation was resolved by consent agreement "without any findings or admissions of liability", CCC's Statement of Facts, ¶ 52, and, second, none of the copyright registrations upon which the present claims are based was in existence at the time of the 1983 litigation. Indeed, it does appear that no final decision on the merits was rendered in the 1983 action, and, at the very least, the two lawsuits do not assert the same cause of action because of the distinct copyright registrations at issue in each case.

Finally, CCC's assertion that defendants' claim of copyright infringement is barred by the statute of limitations is erroneous in view of defendants' request for relief for acts occurring solely within the three years preceding their counterclaim, cf. 17 U.S.C. § 507(b).

In conclusion, based on all of the foregoing, CCC's pending motion for summary judgment (Doc. No. 111) is granted as to CCC's claim of noninfringement and as to Maclean Hunter's counterclaim of infringement, and is denied as to CCC's claim of copyright invalidity. Maclean Hunter's pending motion for summary judgment (Doc. No. 136) is granted as to CCC's claim of invalid copyright registration and as to CCC's Affirmative Defenses Nos. (2), (5), (6), (7), (8), (9), (10), (11) and (12), and is otherwise denied as to CCC's claim of noninfringement and CCC's Affirmative Defenses Nos. (1), (3) and (4).

Dated at New Haven, Connecticut, this 7th day of April, 1993.

/s/ Arthur H. Latimer

ARTHUR H. LATIMER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COPYRIGHT CLAIMS (DOC.NO.111) AND DEFENDANT'S (MACLEAN HUNTER MARKET REPORTS, INC.) MOTION FOR PARTIAL SUMMARY JUDGMENT ON COPYRIGHT ISSUES (DOC. NO. 136)

6/8/93. After review and over objection, the Magistrate Judge's Recommended Ruling is approved, adopted and ratified. SO ORDERED.

/s/ Alan H. Nevas
Alan H. Nevas, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

JUDGMENT

This cause came on for consideration of the plaintiff's motion for an entry of final judgment pursuant to Rule 58, Fed. R. Civ. P., on Counts I through IV of its complaint and on the counterclaim of Maclean Hunter Market Reports, Inc., before the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith and having filed its Order of Final Judgment on February 9, 1994, directing the Clerk to enter judgment in accordance with the Order,

It is therefore **ORDERED** and **ADJUDGED** that judgment be and is hereby entered in favor of CCC on its claim for a declaratory judgment of noninfringement of copyrights held by Maclean Hunter in the "Automobile Red Book Official Used Car Valuations" ("Red Book"); in favor of CCC on Maclean Hunter's counterclaim for infringement of copyrights held by Maclean Hunter in the Red Book; in favor of Maclean Hunter on CCC's claim for a declaratory judgment of copyright invalidity of copyrights held by Maclean Hunter in the Red Book; in favor of Maclean Hunter on CCC's Affirmative Defenses Nos. 2, 5, 6, 7, 8, 9, 10, 11 and 12; and in favor of Maclean Hunter and Creative on CCC's claims for trade libel, tortious interference with contract, and violation of the Connecticut Unfair Trade Practices Act.

Dated at Bridgeport, Connecticut this 25th day of February, 1994.

KEVIN F. ROWE, Clerk

By_____
Chief Deputy Clerk

FEDERAL STATUTES

17 U.S.C. § 101:

* * * *

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

17 U.S.C. § 103:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such

work is independent of and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

STATE STATUTES AND REGULATIONS

Conn. Gen. Stat. § 38a-353 (1990):

Whenever any damaged motor vehicle covered under an automobile insurance policy has been declared to be a constructive total loss by the insurer, the insurer shall, in calculating the value of such vehicle for purposes of determining the settlement amount to be paid to the claimant, use at least the average of the retail values given such vehicle by (1) the National Automobile Dealers Association used car guide and (2) one other automobile industry source which has been approved for such use by the insurance commissioner. For purposes of this section, "constructive total loss" means the cost to repair or salvage the damaged property, or the cost to both repair and salvage such property, equals or exceeds the total value of the property at the time of loss.

Conn. Ins. Dept. Bull. No. IC-4 (August 28, 1987):

Public Act 87-158, An Act Concerning the Value of Totalled Motor Vehicles, requires that when calculating the value of a totalled vehicle insurers shall "use at least the average of the retail values given such vehicle by (1) the National Automobile Dealers Association used car guide and (2) one other automobile industry source which has been approved for such use by the insurance commissioner."

* * * *

The document used by most automobile dealers and repairers in this state is the NADA and "Red Book." Experience in responding to consumer complaints and/or inquiries has led to a conclusion that these two source materials provide the overall best method for vehicle valuation. By identifying two sources of information, rather than a number of different, and potentially conflicting opinions, a common starting point of reference is achieved and potential areas of dispute limited. Accordingly, the "Red Book" is hereby designated and approved by the undersigned for calculation of the value of motor vehicles by insurers in the State of Connecticut.

PETER W. GILLIES
Insurance Commissioner

N.J. Admin. Code § 11:3-10.4 (1988):

Adjustment of total losses

(a) If the insurer elects to make a cash settlement, it must bear in mind at all times that the insured's position is that of a retail consumer and the settlement value arrived at must be reasonable and fair for a person in that position. If the insurer elects to make a cash settlement, its offer, subject to applicable deductions, must be one of the following plus applicable sales tax:

1. The average of the retail value for a substantially similar motor vehicle as listed in the current editions of

the two valuation manuals approved by the Commissioner.

i. The average figure arrived at may be reduced by considering all factors, including but not limited to mileage tables and presence or absence of extras.

ii. If the destroyed vehicle included an option which is listed in one manual but not in the other, the value of the option shall not be averaged. The insured shall receive full value for the option by carrying over the amount listed to the other manual. The option carryover shall apply only in those instances where the option has not been considered by the used vehicle guide either as a separate item or included in the vehicle's base value.

iii. Manuals approved for use on and after January 1, 1976, are the "Redbook", published by National Market Reports, Inc., and the "N.A.D.A. Official Used Car Guide", published by the National Automobile Dealers Association Used Car Guide Company. The use of any other manuals may be approved by the Commissioner upon demonstration of need, suitability and accuracy.

2. A quotation obtained by the insurer for a substantially similar motor vehicle, obtained from a dealer or individual located within a reasonable distance from the principal place of garagement of the insured vehicle. The insured must be able to purchase the substantially similar vehicle at the quoted location for the insurer's cash offer plus applicable deductions.

3. If it is not possible to value the damaged vehicle by using alternative methods, paragraphs 1 or 2 of this subsection, the insurer must determine the retail value by the best available method and must fully explain in writing to the insured how its offer was calculated.

* * * *

11 N.Y. Admin. Code § 216.7(c) (1990):

(c) Adjustment of total losses

(1) If the insurer elects to make a cash settlement, its minimum offer, subject to applicable deductions, must be one of the following:

(i) The average of the retail values for a substantially similar vehicle as listed in two valuation manuals current at the date of loss and approved by this Department. Manuals approved for use are -- *The Redbook*, published by National Market Reports, Inc., and *The N.A.D.A. Official Used Car Guide*, published by the National Automobile Dealers Used Car Guide Company. The use of other manuals may be approved by this Department upon demonstration of need and suitability. If it is evident that an option has not been considered in either or both of the above valuation manuals, the insurer shall consider the value, if any, of such option in arriving at the vehicle's value and shall utilize the best available method to value such option. The insurer may deduct documented, reasonable dealer preparation charges, up to

$75, from the average of the retail values. The insurer shall provide to the insured, no later than the date of payment of the claim, a detailed copy of its calculation of the insured vehicle's total loss value, including the valuation of options which are not considered in the base price of the vehicle.

(ii) A quotation for a substantially similar vehicle, obtained by the insurer from a qualified dealer located reasonably convenient to the insured. A reasonable location shall be within 25 miles of the place of principal garagement of the motor vehicle. The substantially similar available vehicle must remain available for purchase by the insured for a period of three calendar days subsequent to receipt of notice of its availability by the insured, and the insured must be able to purchase the substantially similar vehicle at the quoted dealer for the insurer's cash offer plus applicable deductions. The insurer must maintain in its claim file the dealer's name and location, the vehicle identification number, the dealer stock number, the mileage and the major options for the substantially similar vehicle which was the basis of its quote. The notice to the insured of the availability of a substantially similar vehicle must be sent by certified mail, return receipt requested, or be a sound-recorded conversation reflecting the date of notice. The three calendar days commence on the date the insured acknowledges receipt of notice. The insured need not purchase the vehicle used as the basis of the insurer's quotation, since the quotation merely serves as a basis for the insurer's offer. The foregoing period is satisfied at the point an insured physically verifies the existence of

the substantially similar available vehicle used as the basis of the insurer's quotation. Should the insurer's research of substantially similar vehicles determine that the retail values contained in the valuation manuals, prescribed in subparagraph (i) of this paragraph, are inadequate to purchase a substantially similar vehicle, the insurer's offer should be the amount determined by such research.

31 Pa. Code § 62.3 (1989):

(f) The following standards shall be used to determine replacement value under policy provisions covering the total loss of a motor vehicle including an unrecovered motor vehicle:

(1) If the costs of repair of a motor vehicle exceed its appraised value, less salvage value, or the motor vehicle cannot be satisfactorily or reasonably repaired to its condition just prior to the damage in question being incurred, the appraised value of the loss shall be the replacement value of the motor vehicle.

(2) The replacement value of a motor vehicle shall be calculated by use of one of the following methods:

(i) *Guide book method.* The appraiser shall calculate the average of the figures reflecting the retail book value of a vehicle of like kind and condition, as stated in the correct of the Red Book (National Market Reports, Inc., Circulation

Department, 300 West Adams Street, Chicago, Illinois 60606, telephone 1-800-671-9907) and the NADA Book (Subscription Department, P.O. Box 7800, Costa Mesa, California 92628, telephone 1-800-622-6232), adjusted for equipment and mileage, less the cost of repair of damage which preexisted the accident in question. There shall be no other deductions except for salvage and then only if the owner elects to retain the vehicle.

(ii) *Actual cost method.* The appraiser shall determine the actual cost of purchase of an available motor vehicle of like kind and quality in condition similar to or better than the motor vehicle being appraised just prior to the damage in question being incurred.

(iii) *Dealer quotation method.* The appraiser shall consult with delaers or other persons knowledgeable in the field to secure quotations as to the value of the motor vehicle being appraised. At least two quotations shall be secured. The figures thus secured shall be averaged.

(3) If the motor vehicle is listed in both the Red Book and the NADA Book, including older car publications, the replacement value shall be calculated by the guide book method or by the actual cost method, as described in paragraph (2). If the actual cost method is used, and the owner of the damaged vehicle shows that the replacement vehicle is not of the same kind and quality, both calculations referenced in this paragraph

shall be made, and the higher of the values obtained shall be offered in settlement.

(4) If the motor vehicle is not listed in both the Red Book and the NADA Book, including older car publications, or if the vehicle differs materially from the average vehicle because of factors not considered in guide books, for example, antique or classic cars, vehicles no longer manufactured, and unique vehicles, the replacement value shall be calculated by the actual cost method or by the dealer quotation method, as described in paragraph (2). If the dealer quotation method is used, both calculations referenced shall be made, and the higher of the values offered in settlement.

CCC REPORT
July 1991

CONFIDENTIAL

AETNA CASUALTY & SURETY (203)240-6540
BOX 930
HARTFORD, CT 06143

DATE: 08/01/91 VINGUARD VALUATION SERVICE - 27545 - 11619038 TIME: 17:01

ADJUSTER:	CLAIM REFERENCE:	LOSS DATE:	VIN:
ROTHERFORTH	2078Y26938781	06/11/91	1GTFK24K7KE508211
OWNER:		INSURED:	

VINGUARD: 89 GMC K25 4X4 TK24
8-5.7L-FI
INSURER: 89 GMC K25 4X4 WIDESIDE TK24
8-5.7L-FI AT 4W 2D P/U
MESSAGES: * NO ERRORS DETECTED *

OPTIONS: (B = BASE A = ADD D = DEDUCT N = NO ADJUSTMENT)

AUTO TRANSMISSION	A *	142.50	4 WHEEL DRIVE	B	0.00
POWER STEERING	B	0.00	POWER BRAKES	B	0.00
POWER WINDOWS	A	137.50	POWER LOCKS	A	112.50
AIR CONDITIONING	A *	250.00	TILT WHEEL	A	100.00
CRUISE CONTROL	A	125.00	AM RADIO	B	0.00
FM RADIO	A *	37.50	STEREO	A *	37.50
CASSETTE	A	100.00	SEARCH/SEEK	A *	75.00
EQUALIZER	A *	200.00	TWO TONE PAINT	B	0.00
BEDLINERS(DURALINER)	A *	125.00	TRAILERING PACKAGE	A *	150.00
SNOWPLOW PACKAGE	A	800.00			

COMPUTERIZED BASE VALUE		$ 11,387.50
TOTAL OPTIONS		$ 2,412.50
SIERRA SLE	A	$ 650.00
ODOMETER - 39,000	D	$ 325.00-
DEALER PREP	D	$ 25.00-
ACTUAL CASH VALUE		$ 14,100.00
SALES TAX 8.00%	A	$ 1,128.00
COMPUTERIZED VALUE		$ 15,228.00

*OCS=JOHN/S UNIT.

NOTICE: THIS TOTAL LOSS EVALUATION HAS BEEN PREPARED BY COMPUTER IN ACCORDANCE WITH CONNECTICUT PUBLIC ACT 87-158.

TER

AUTOMOBILE RED BOOK
July 1991

GMC 1989

Avg. Fin. Value	Avg. Whsl. Value	Model No.	Description	Engine	GVW	W.B.	Net Wt.	Sugg. Fact. Price	Ins Symb.	Avg. Retail Value	O P T
Pickup Extended Cab 4x2 C Series Wideside Conv. (Fenderless) T = 1,M = 3 (continued)											
8875	7750	C19	Pkup Ext 4x2 1500	8G 262	6000	155.5	4074	11527		8600	X
7250	6100	C29	Pkup Ext 4x2 2500	8G 262	7200	141.5	NA	NA		9200	X
7425	6250	C29	Pkup Ext 4x2 2500	8G 262	7200	155.5	4224	12568		9300	X
7925	6450	C29	Pk Ext 4x2 2500 HD	8G 350	8800	155.5	NA	13472		9500	X
7875	6750	C39	Pkup Ext 4x2 3500	8G 454	8800	155.5	4562	13813		9600	X
Pickup 4x4 K Series Wideside Conventional (Fenderless) T = 1,M = 3											
7670	6525	K14	Pkup 4x4 1500	8G 262	5600	117.5	4097	12425		9725	X
7925	6675	K14	Pkup 4x4 1500	8G 262	5600	131.5	4178	12620		9675	X
8188	6875	K24	Pkup 4x4 2500	8G 262	7200	131.5	4295	12814		10275	X
8438	6375	K24	Pkup 4x4 2500 HD	8G 350	8800	131.5	NA	14534		10575	X
8705	6675	K34	Pkup 4x4 3500	8G 454	8800	131.5	4883	14874		10675	X
Pickup Extended Cab 4x4 K Series Fleetside Conv. T = 1,M = 3											
8325	8200	K19	Pkup Ext 4x4 1500	8G 262	6200	141.5	NA	NA		10400	X
8488	8400	K19	Pkup Ext 4x4 1500	8G 262	6200	155.5	4521	13751		10900	X
8638	8600	K29	Pkup Ext 4x4 2500	8G 262	7200	141.5	NA	NA		11000	X
8905	8800	K29	Pkup Ext 4x4 2500	8G 262	7200	155.5	4580	14131		11150	X
9135	10150	K29	Pk Ext 4x4 2500 HD	8G 350	8800	155.5	NA	15582		11300	X
9405	10400	K39	Pkup Ext 4x4 3500	8G 454	8800	155.5	4900	15821		11600	X
Pickup Bonus Cab 4x2 R Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	R24	Bns Pkup 4x2 25	8G 350	8600	164.5	4748	14228		—	X
—	—	R34	Bns Pkup 4x2 35	8G 350	9300	164.5	4821	14362		—	X
Pickup Crew Cab 4x2 R Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	R24	Crew Pkup 4x2 25	8G 350	8200	164.5	4808	14726		—	X
—	—	R33	Crew Pkup 4x2 35	8G 350	9300	164.5	4882	14871		—	X
Pickup 4x2 C Series Sportside Conv. (Fender) T = 1,M = 3											
8455	7175	C14	Pkup 4x2 1500	8G 262	5300	117.5	3429	10553		8275	X
Pickup 4x4 K Series Sportside Conv. (Fender) T = 1,M = 3											
7995	6775	K14	Pkup 4x4 1500	8G 262	5600	117.5	4023	12578		9875	X
Pickup Bonus Cab 4x4 V Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	V34	Bns Pkup 4x4 35	8G 350	9200	164.5	5306	18949		—	X
Pickup Crew Cab 4x4 V Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	V33	Crew Pkup 4x4 35	8G 350	9200	164.5	5367	17481		—	X

MISCELLANEOUS EQUIPMENT

Avg. Fin. Value	Avg. Whsl. Value	Item	Application	Sugg. Fact. Price	Avg. Retail Value
175	175	Sierra SLX (C,K Pkup)		Avg 350	300
225	225	High Sierra (R,V Pkup)		Avg 372	325
800	800	Sierra SLE (C,K Pkup)		Avg 643	650
850	850	Sierra Classic (R,V Pkup)		Avg 888	800
775	775	Sierra Classic Suburban		Avg 1656	1050
750	750	Sierra Classic Jimmy V18		1340	1000
150	150	High Sierra (S15 All)		Avg 219	200
425	425	Sierra Classic (S15 All)		Avg 610	550
700	700	Gypsy (S15 Jimmy)		Avg 1063	950
350	350	Leather High Backs (S15)		Avg 511	400
300	300	High Back Buckets (Suburban)		887	400
250	250	V8 over 4 Cyl.		—	325
350	350	V8 over 6 Cyl.		—	325
975	975	Diesel over Gas		—	900

ENGINES

Avg. Fin. Value	Avg. Whsl. Value	Model	Application	Cyl.	Cu.In.	H.P.	Tax H.P.	Sugg. Fact. Price	Avg. Retail Value
NOTE: Prices for 379 6.5L diesel engines are approximate.									
—	—	151		4	151	92	NA	STD	—
—	—	173		6	173	110	NA	STD	—

GMC 1989

ENGINES

Avg. Pic. Value	Avg. Whsl. Value	Model	Application	Cyl.	Cu.In.	H.P.	Tor. H.P.	Suggs. Fact. Price	Avg. Retail Value
—	—	262		8	262	140	NA	STD	—
—	—	292		6	292	115	265	STD	—
—	—	305		8	305	150	245	STD	—
—	—	350		8	350	165	512	STD	—
—	—	350		8	350	165	512	STD	—
—	—	454		8	454	245	378	STD	—
—	—	173	LS 151-E	4	173	110	NA	370	—
—	—	262	LS 161-E	6	262	140	NA	550	—
—	—	—	LS 173-E	6	262	140	NA	255	—
—	—	305	LS 262-E	8	305	150	245	556	—
—	—	350	LS 262-E	8	350	165	512	755	—
—	—	—	LS 292-1	8	350	165	512	755	—
—	—	454	LS 292-1	8	454	245	378	1325	—
—	—	454	LS 350-E	8	454	245	378	459	—
—	—	379	H.D LS GAS	8	379	130	NA	2500	—

1988 GMC

Avg. Pic. Value	Avg. Whsl. Value	Model No.	Description	Engine	GVW	W.B.	Net Wt.	Suggs. Fact. Price	Inv.	Avg. Retail Value	O T
Note: Model Numbers shown are the 5th, 6th & 7th Digits of the VIN No. GMC light duty truck types are designated by a letter as follows: R=4x2, C=4x2, V=4x4, K=4x4, S=Compact 4x2, T=Compact 4x4, G=Van; M=Mini Van, P=Shapes											
Dual Rear Wheels Standard.											
ChsCab S15 4x2 Compact Conventional T=1,M=3											
—	—	S14	Chs Cab S15	4G 151	4100	117.9	NA	8865		—	X
Pickup S15 4x2 Wideside Compact (Fenderless) T=1,M=3											
3530	3025	S14	Pkup S15 4x2 Spl	4G 2.5	3500	108.3	2609	8640		4799	X
4250	4725	S14	Pkup S15 4x2	4G 2.5	3500	108.3	2530	7980		8888	X
4365	4875	S14	Pkup S15 4x2	4G 2.5	3500	117.9	2800	8184		5775	X
Pickup Extended Cab S15 4x2 Wideside Compact (Fenderless) T=1,M=3											
4815	5300	S15	Pkup S15 Ext 4x2	4G 2.5	3500	122.9	2615	9009		6250	X
Pickup T15 4x4 Wideside Compact (Fenderless) T=1,M=3											
5725	6375	T14	Pkup S15 4x4	4G 2.5	3825	108.3	2968	10184		7355	X
5850	6500	T14	Pkup S15 4x4	4G 2.5	3825	117.9	2923	10268		7488	X
Pickup Extended Cab T15 4x4 Wideside Compact (Fenderless) T=1,M=3											
6275	6975	T15	Pkup S15 Ext 4x4	4G 2.5	3825	122.9	2958	10875		7688	X
Jimmy S15 4x2 Closed Compact Utility Hardtop T=1,M=3											
5535	6150	S15	S15 4x2	4G 2.5	3597	100.5	2801	10575		7228	X
Jimmy T15 4x4 Closed Compact Utility Hardtop T=1,M=3											
6975	7750	T15	S15, 4x4	4G 2.5	4076	100.5	3115	12794		8668	X
Jimmy K5 Closed Utility w/Hard Top T=1,M=3											
8595	9550	V15	K5 4x4	8G 350	6100	165.5	4334	14569		10650	X
Suburban 4x2 Wagon w/Panel Doors T=3,M=3											
7875	8750	R15	Wgn P Dr 4x2 15	8G 350	6100	129.5	4297	13897		9690	X
8190	9098	R25	Wgn P Dr 4x2 25	8G 350	8600	129.5	4588	14611		10199	X
Suburban 4x2 Wagon w/End Gate T=3,M=3											
7920	8800	R15	Wgn Gate 4x2 15	8G 350	6100	129.5	4335	14040		9888	X
8145	9050	R25	Wgn Gate 4x2 25	8G 350	8600	129.5	4706	14664		10260	X
Suburban 4x4 Wagon w/Panel Doors T=3,M=3											
9135	10150	V15	Wgn P Dr 4x4 15	8G 350	6100	129.5	4714	14482		11488	X
9360	10400	V25	Wgn P Dr 4x4 25	8G 350	8600	129.5	4886	14000		11700	X
Suburban 4x4 Wagon w/End Gate T=3,M=3											
9180	10200	V15	Wgn Gate 4x4 15	8G 350	6100	129.5	4752	14984		11359	X
9405	10450	V25	Wgn Gate 4x4 25	8G 350	8600	129.5	5024	16345		11700	X
Safari 4x2 Mini Cargo Van T=2,M=3											
5445	6050	M15	Safari Cargo	4G 151	NA	111	3388	9839		7199	X
Safari 4x2 Mini Passenger Van T=2,M=3											
6345	7050	M15	Safari SLX	4G 151	NA	111	3588	10745		8288	X
6728	7475	M15	Safari SLE	4G 151	NA	111	3637	11538		8775	X